69-3100-6781-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

David J. Donery,

Petitioner,

RECOMMENDATION FOR SUMMARY DISPOSITION IN FAVOR OF PETITIONER

V.

Minneapolis Park & Recreation Board,

Respondent.

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on a Motion for Summary Disposition made by Respondent Minneapolis Park & Recreation Board (Board).

Lorrie L. Bescheinen, Borkon, Ramstead & Mariani, Ltd., Attorneys at Law, 485 Northstar East, 608 Second Avenue South, Minneapolis, Minnesota 55402 represents the Petitioner, David J. Donery. Duane G. Johnson and Thomas P. O'Donnell, Mackall, Crounse & Moore, Attorneys at Caw, 1600 TCF Tower, 121 South Eighth Street, Minneapolis, Minnesota 55402-2859 represents the Board. The record on Respondent's motion closed on March 5, 1993, upon receipt of the Board's reply memorandum.

Based on the record herein and for the reasons stated in the following memorandum:

IT IS HEREBY RECOMMENDED that the Commissioner of Veterans Affairs order that:

1. Donery's Petition is not barred by Minn. Stat. 541.05.

2. The Board's placement of Donery on light duty and refusal to allow him to return to work are removals under Minn. Stat. 197.46.

3. The Board has violated Donery's rights under Minn. Stat. 197.46 by removing him without notice of his right to a hearing before the Minneapolis Civil Service Commission acting as a Veterans Preference

Hearing Board.

4. The Board's motion for summary disposition be DENIED.

5. Summary disposition in favor of Donery be, sua sponte , GRANTED, on the issue of Donery's right to a hearing before the Minneapolis Civil Service Commission.

6. The Board shall offer Donery a removal hearing before the Minneapolis Civil Service Commission to determine whether the Board's actions in putting Donery on light duty and refusing to put Donery on full duty are reasonable.

Dated: April 5 1993.

STEVE M. MIHALCHICK
Administrative Law Judge

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner, Department of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 W. 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

## MEMORANDUM

The Board has moved for summary disposition on two grounds: 1) that the statute of limitations on filing a claim based on demotion has expired and 2) that it has not "removed" Donery. The Administrative Law Judge concludes that the Board is incorrect on both grounds and recommends summary disposition in favor of Donery.

Summary Disposition

Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. R. 1400.5500K. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn.App. 1985); Minn.R.Civ.P. 56.03 (1984).

In a motion for summary disposition, the initial burden is on the moving party to allege facts that establish a prima facie case and show that no genuine issues of fact remain for hearing. Theile Y. Stich, 425 N.W.2d 580, 583 (Minn. 1988). A genuine issue of fact is one that is not sham or frivolous. Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn.App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986); Island Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn.App. 1984). General averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of that view of the evidence which is most favorable, and all doubts and inferences must be resolved against the moving party. See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn. Ct. App. 1985).

Facts

The parties have agreed upon stipulated facts which have been entered into the record and are hereby incorporated by reference (hereinafter cited "Stipulation I ). A few factual issues remain in dispute, but, as discussed below, they are not germane to the issues in this forum. Summarizing the stipulated facts, Donery is an honorably discharged veteran. Stipulation I 1. He held the position of Mobile Equipment Operator for the Board from June 12, 1972, until he suffered a work-related lower back injury on October 25, 1983. Stipulation paragraph 6. Donery underwent surgery to alleviate back pain from the injury on September 26, 1985. Stipulation paragraph 19. He has worked in light duty positions for the Board from December, 1983, to February 7, 1987. Stipulation paragraph 11, 12, 17, and 25. Work limitations have been imposed on Donery by his doctors since October, 1983. These limitations are: no lifting of more than 20 pounds, no bending more than 20 degrees, and alternating posture every 30 minutes. Stipulation parapgraph 28.

The Board did not have any light duty positions available consistent with Donery's limitations on February 11, 1987. Stipulation paragragh 28. On January 22,

1992, Donery was medically cleared to drive a truck. Stipulation paragraph 39. The Board has no position whose description only includes driving a truck. Stipulation paragraph 39. Donery asserts that his seniority would allow him to only drive a truck and not be required to perform the other duties of a Mobile Equipment Operator. The Board disagrees.

Current Board procedures retain disabled full-time permanent employees receiving worker's compensation on the Board's employment rolls. Stipulation paragraph 46. Donery is at present receiving worker's compensation benefits. Stipulation paragraph 43. Donery is on the Board's employment roll and the employment roll of the Minneapolis Civil Service Commission. Id. Donery's present

status from the Board's view is best described by the last paragraph in item 46:

> Inasmuch as Donery has not returned to his previous position nor obtained suitable employment, he remains on the employment roster and employed by the Park Board as a mobile equipment operator. Under the aforementioned procedures, he would continue to receive the above benefits of employment as stated in paragraph No. 45, in addition to worker's compensation benefits, until he either returns to his position or finds suitable replacement employment and is removed from his Park Board employment and the employment roster, at which time the Minneapolis Civil Service Commission would notify him of his right to a veterans hearing. Currently, if medical opinion within the purview of the workers' compensation law is furnished supporting the position that Donery is medically fit to perform the duties of mobile equipment operator, he will immediately be returned to that position. He currently ranks fourth on the Park Board's mobile equipment operator seniority list.

No doctor has certified Donery as fit to return to the mobile equipment operator position as described by the Board. Donery maintains that he can work within his medical restrictions in the position he held prior to his injury. Donery has served on active duty with his Air National Guard unit for one month in the fall of 1990. Stipulation paragraph 37. Donery has worked as a school bus driver as recently as 1992. Stipulation paragraph 42.

Statute of Limitations

The Board argues that Donery is barred from pursuing this petition by operation of Minn. Stat. 541.05, which requires actions upon a liability created by statute to be commenced within six years. There are a number of reasons this argument must be rejected. First, "actions" are defined as "any proceeding in any court of this state." Minn. Stat. 645.45(2). Donery filed his petition with the Department of Veterans Affairs under Minn. Stat. 197.481, subd. I by mail on June 24, 1992. This proceeding is a contested case hearing held pursuant to Minn. Stat. 197.481, subd. I and Minn. Stat. chapter 14. No court is involved in this proceeding. A contested case hearing is not an "action," as that term is used in Minn. Stat. 541.05 or at common law. Olson v. Ottertail County, OAH No. 6-3100-5639-2, at 4 (Order issued February 28, 1992) (citing HAr-MAr, Inc. v. Thorsen & Thorshov, Inc., 218 N.W.2d 751, 754 (Minn. 1974); Spiva v. American Standard Insurance Company, 361 N.W.2d 454, 457 (Minn.App. 1985); Muirhead v. Johnson, 46 N.W.2d 502, 505 (Minn. 1951); and In the Mattter of Wage and Hour Violations of Holly Inn, 386 N.W.2d 305 (Minn.App. 1986). The Board also argues that the

I/ In a recent veteran's preference case, James F. Lewis v. City of

Minneapolis, OAH No. 69-3100-4213-2, at 4 (Order issued April 6, 1990) this Administrative Law Judge held that certain claims were barred by the six-year statute of limitations. The holding was based upon Oak Ridge Core Center v. Department-of Human Services, 452 N.W.2d 703 (Minn.App. 1990). However, that case was reversed by the Minnesota Supreme Court, 460 N.W.2d 21 (Minn. 1990), so that holding of Lewis is no longer valid.

statutory definition of action does not apply to legislation enacted prior to enactment of Minn. Stat. 645.45(2) in 1941. While the predecessor to Minn. Stat. 197.46 was enacted in 1907, the administrative remedy of 197.481 was not enacted until 1973 and that is the statute at issue here. Minn. Laws 1973, Ch. 570, 1.

Second, even if this were an "action," the statute of limitations would not apply. The Board asserts the six-year statute of limitations should apply to actions under Minn. Stat. 197.481 because that statute is in pari materia with Minn. Stat. 197.46 and the statute of limitation applies to that statute. Minn. Stat. 197.46 reads in pertinent part:

> Any person whose rights may be in any way prejudiced contrary to any of the provision of this section shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the several ... cities ... in the state, who is a veteran separated from the military under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.
>
> Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of the receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

The issue of whether any time limit exists for requesting mandamus has been examined on appeal. In Young v. City of Duluth, 386 N.W.2d 732, 738 (Minn. 1986), the Supreme Court stated:

> Under the Act, if no notice is given to the veteran, no time limitation for the commencement of a hearing begins to run. It is immaterial whether a veteran is aware of his or her preference rights under the Act.

Reading Minn. Stat. 197.46 and 197.481 in pari materia results in an identical result for both statutes on the issue of statutes of limitation. Where no notice has been given of the veteran's right to a hearing, no

limitation applies. Where the notice has been given, the veteran has 60 days to apply for a writ of mandamus under Young. If the veteran has not requested a hearing within 60 days of the notice, the waiver provision of Minn. Stat. 197.46 precludes a veteran from applying for mandamus and, presumably, from petitioning the Commissioner of Veterans Affairs under Minn. Stat. 197.481. The only time limitation on the veteran's action is triggered by a notice of a right to a hearing. No notice of a right to hearing was ever given in this case. The Board argues that the Civil Service Commission, not the Board, has the only records that indicated an employee's veteran status and that it is the Commission that is responsible for any notices. That argument is rejected because the Board is the employer here and therefore the Board is responsible for compliance with the Veteran Preference Act.

Third, at least some of the "removals" alleged by Donery have occurred since June 24, 1986, and would not be barred by the six-year statute of limitations. If the Board's refusal to allow Donery to return to his full-time position until he is medically cleared to perform all the functions of the job is considered one "removal," then it is still continuing and would not be barred by the statute of limitations. For all these reasons, Donery's petition is not barred by Minn. Stat. 541.05.

Removal

In Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987), the Supreme Court examined the issue of whether an indefinite medical leave of absence constitutes a removal. The relevant facts in Myers are:

> (1) The employee suffered a work-related lower back injury resulting in a permanent partial disability and it was unlikely that his condition would improve to a significant degree.
>
> (2) The examining doctors placed work restrictions on the employee because of the injury.

2/ The Supreme Court implied the 60-day limit on seeking mandamus from the 60-day limit for requesting a hearing. Justice Simonett, concurring specially, felt it was up to the Legislature to impose any such limit and would have held that only laches would time-bar a mandamus action. And see, Myers v. City of Oakdale, 465 N.W.2d 702 (Minn.App. 1991) which held that the sixty-day limit of Minn. Stat. 197.46 applies only to the right to a hearing and reinstatement, not to a mandamus action.

(3) The employer placed the employee on an indefinite medical leave of absence based on the examining doctors reports.

(4) The employer would not permit the employee to return to his duties until medical doctors determined the employee was able to perform all the duties of the employee's job classification.

Myers, 409 N.W.2d, at 851.

The Court determined that a "removal" under the Veteran's Preference Act occurs when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job. Id. at 850-851. Based on the facts above, the Supreme Court held that the employee had been removed from his position and had a right to a removal hearing before a Veteran's Preference hearing board under the Veteran's Preference Act. Id. at 853. The Supreme Court went on to note:

> We consider it appropriate to comment on the role of the hearing board when the case involves removal due to physical inability to perform the job. As we said in Southern Municipal Power Agency v. Schrader, 394 N.W.2d 796, 801-02 (Minn. 1986), the task of the hearing board is to determine whether the employer acted reasonably. In making this determination, a hearing board is not to determine what, if any, physical restrictions should be placed on a veteran's activity--that is a medical determination. The proper role of the hearing board is to determine whether, in light of any restrictions placed on a veteran's activity by examining and treating doctors, the employer acted reasonably.

Myers, 409 N.W.2d, at 853.

The Board argues that it has taken no action to make it unlikely or improbable that Donery will be able to return to the job. But the stipulated facts are essentially the same facts as appeared in Myers. Donery has a work-related injury resulting in work restrictions. Donery's status is not formally termed a leave of absence, but he is not performing any duties while being maintained on the employment roll of the Board. He is not receiving wages from the Board, although he is receiving workers' compensation benefits. Donery seeks to return to his position and is denied that return by the Board until medical doctors certify that he is fit to perform all the duties of the mobile equipment operator position. He received a permanent partial disability payment. He has been unable to return to his prior position for over nine years and during that time he has had essentially the same work restrictions. There is no reason to believe the restrictions will be lifted and that he will be able to return to work on the Board's conditions. Thus, as long as the Board imposes those conditions, it is unlikely that Donery will return to his prior position.

Donery claims he can return to work and the Board's refusal to permit his return is unwarranted. Donery asserts that he is fit to return to the

functions which he will have to perform in the last position he held with the
Board. The Board maintains that Donery cannot return to work so long as he has a restriction against performing any of the tasks falling within the

description of that position. Whether Donery is being unreasonably prevented from working is the only issue in dispute. This issue falls within the jurisdiction of the Veterans Preference Hearing Board, not the Administrative Law Judge or the Commissioner of Veterans Affairs. Donery is entitled to a hearing before such a board. In this case, that would be the Minneapolis Civil Service Commission.

Donery has not moved for summary judgment. However, the analysis of the Board's motion demonstrates that Donery is entitled to a hearing before the Civil Service Commission as a matter of law. Where no factual issues remain to be resolved and no prejudice results, summary judgment may be granted sua sponte. Del Hayes & Sons, Inc. v. Mitchell, 230 N.W.2d 588, 591-92 (Minn. 1975); McElwain v. Van Beek, 447 N.W.2d 442, 446 (Minn.App. 1989); Franklin Auto Body Company v. Wicker, 414 N.W.2d 509, 512 (Minn.App. 1987). The Board has extensively researched its arguments and availed itself of every opportunity to oppose granting Donery a hearing in this case. The Board is not prejudiced by a grant of summary judgment in favor of Donery.

Conclusion

If Donery would not actually be required to perform restricted duties as part of the position he left, the Board's refusal to allow Donery to return to the position of Mobile Equipment Operator may be unreasonable. The Administrative Law Judge lacks jurisdiction to decide that issue. Under Myers, the appropriate forum for deciding the reasonability of the Board's actions is the Civil Service Commission. No material issues of fact remain disputed concerning Donery's right to a removal hearing. Donery is entitled as a matter of law to a removal hearing before the Civil Service Commission. The Board's Motion for Summary Disposition must be DENIED. Since summary judgment is appropriate here and the Board will not be prejudiced, the Administrative Law Judge, sua sponte, recommends summary disposition in favor of Donery on the right to a removal hearing. The Board should be ordered to offer a removal hearing before the Civil Service Commission in this matter.

S.M.M.